IN THE

Supreme Court of the United States

OCTOBER TERM - 1971

No. 71-5445

GERALD SHADWICK,
Appellant,

v.

CITY OF TAMPA,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the final judgment of the Supreme Court of Florida on the following grounds:

I. The appeal does not present a substantial federal question.

II. The federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

III. The Court should not set the case for argument because the decision below is so obviously correct as to warrant no further review.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported in 250 So.2d 4 affirming the opinion of the District Court of Appeal, Second District, reported in 237 So.2d 231. Copies of these opinions are attached hereto, by Appendices, respectively, in App. A, *infra*, pp. A 1-3 and in App. A, *infra*, pp. A 4-8.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257(2).

QUESTIONS PRESENTED

1. Whether special and general laws pertaining to duties of clerks of the municipal court to issue arrest warrants are constitutional delegation of a quasi-judicial power, and impliedly therewith, the power to determine probable cause.

2. Whether the clerk or deputy clerks of the municipal court of the City of Tampa are neutral and detached "magistrates" unconnected with law enforcement, for the purpose of issuing arrest warrants within the requirements of the United States Constitution, Fourth and Fourteenth Amendments, and Fla. Const. Art. I, Sec. 12 (1968), by virtue of the Florida Statutes fixing their powers and duties to issue arrest warrants.

STATUTES INVOLVED

The statutes involved are *Fla. Stat.* (1967) Section 168.04, F.S.A., and Sections 495 and 160.1 of the Charter of the City of Tampa (Special Laws of Florida incorporated in the Charter of the City of Tampa). They are printed in App. B, *infra*, p. A 9.

STATEMENT

This is an appeal from a final judgment rendered by the Supreme Court of Florida, reported as *Shadwick v. City of Tampa*, 250 So.2d 4 (1971) (App. A, pp. A 1-3) where the question of the validity of state statutes (App. B, p. A 9) as being repugnant to the Fourth and Fourteenth Amendments, United States Constitution, were drawn into question, and the decision was in favor of their validity. The statutes involved vest in the city clerks the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest.

In this Motion to Dismiss or Affirm pursuant to Rule 16, Supreme Court Rules, the parties will be referred to as they stand in this Court, Appellant and Appellee, respectively.

The following symbols will be used:

"App."	for Appendix of Appellee.
"JS."	for Appellant's Jurisdictional Statement.
"JSA."	for Appellant's Appendix to Jurisdictional Statement.
"R."	for original Record-on-Appeal to Supreme Court of Florida.

This cause was commenced when the Appellant was arrested and charged with "careless driving while drinking" on March 6, 1969, in the City of Tampa, Hillsborough County, Florida, in violation of Section 36-89(b), City of Tampa Code (R. 4-5; App. C, pp. A 10-11). The Appellant filed his Motion to Quash Warrant on March 13, 1969, in the Municipal Court of the City of Tampa (R. 6-7; App. C, pp. A 12-13) and subsequently, on April 18, 1969, an Order was entered denying said Motion (R. 8; App. C, p. A 14). Appellant on April 23, 1969, filed Petition for Writ of Certiorari in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, (R. 1-3; App. C, pp. A 15-18) and on July 23, 1969, the Honorable Neil C. McMullen, Circuit Judge, entered an Order Denying Writ of Certiorari. (R. 9; App. C, p. A 18).

From this Order, Appellant on August 21, 1969, timely filed his Notice of Appeal to the Supreme Court of Florida which found the matter to be within the jurisdiction of the District Court of Appeal, Second District, and transferred the case there.

Subsequently, on assignments of error (R. 11; App. C, p. A 19), and after oral argument, the Second District Court of Appeals filed its Opinion on June 24, 1970, holding the challenged statutes valid constitutionally. (App. A, pp. A 4-8).

At this juncture, a Petition for Rehearing was filed (R. 62-65; App. C, pp. A 20-23) belatedly raising for the first and only time the issue of the insufficiency of the warrant.

On appeal to the Supreme Court of Florida, the Appellant did not brief or argue the sufficiency of the war-

rant (App. D, pp. A 24- 55) nor did the Appellee. (App. D, pp. A 56-76).

From a final judgment rendered by the highest court of this state holding the involved statutes valid (App. A, pp. A 1-3), which vest in the city clerk the power to issue arrest warrants, and impliedly therewith the power to determine the question of probable cause for the arrest, the Appellant timely filed his Notice of Appeal to this Court. (JSA. 1-2).

ARGUMENT I.

The appeal does not present a substantial federal question.

Appellant misstates the question presented to the lower court by adding in the Jurisdictional Statement to this Court matters never presented to the lower court for its consideration such as "conclusionary terms" of the affidavit (JS. 3; JSA. 10), "sufficient information to support an independent judgment that probable cause exists for such warrants" (JS. 3), the district court "... held that neither the State nor Federal Constitution require the determination of probable cause required for the issuance of arrest warrants be made by a judicial officer,. . ." (JS. 4), that "This appeal presents to this Court for the first time the question of whether the independent judgment that probable cause exists . . . may be made by a non-judicial officer. . ." (JS. 5) (which has no bearing upon the validity of the state statutes involved and fails to distinguish a clerk's obvious quasi-judicial duties imposed by statutes), and that the conclusionary statement in the affidavit is a "rubber stamp" on a printed form thus rendering the individuals rights under the Fourth and Fourteenth Amendments false or artificial (JS. 8-9). This is a different "rubber stamp" argument mentioned in passing by Appellant at the intermediate state court level (App. A, p. A 8), never raised again in the Supreme Court of Florida (App. A, pp. A 1-3) and unsupported factually by Appellant with anything other than the bare affidavit and warrant. (R. 4-5; App. C, pp. A 10-11).

What other factual information the clerk may have had for issuing the warrant is left to speculation by Appellant unlike the facts in *Whiteley* v. *Warden,* 401 U.S.

560 (1971) upon which Appellant relies heavily. Appellant in arguing these issues as a substantial federal question has produced in support thereof a factually silent record.

Appellant would have only a judge or strictly judicial officer empowered to determine probable cause. Such a stringent requirement would inhibit new or different procedures to meet the needs of crowded metropolitan courts and overburden the very small village which may only have a mayor, a clerk and a marshal to administer justice. The Court, in this case, must recognize the broad spectrum of needs of the people in relationship to where they live. Territorial uniformity of state laws governing criminal procedure is not a constitutional prerequisite. *United States* v. *Commissioners of Correction, City of New York,* 316 F. Supp. 556, 564-566 (D.C. S.D.N.Y. 1970).

In support of a substantial federal question, Appellant cites a number of state decisions which are without territorial uniformity in criminal procedure (JS. 8). However, failure to have uniformity of criminal procedure among the several states is not a substantial federal question. The expected norm is that state governments will vary its laws of criminal procedure to meet the needs of the people. *Salsburg* v. *State of Maryland,* 346 U.S. 545, 552-553 (1954); *Ocampo* v. *United States,* 234 U.S. 91, 98-99 (1914).

In further support of a substantial federal question, the Appellant cites a line of cases (JS. 5) supporting the decision in *Whiteley* v. *Warden, Wyoming State Penitentiary,* 401 U.S. 560 (1971).

> "The decisions of this Court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." 401 U.S. at ——; 91 S.Ct at 1035.

This is not new law as documented by the numerous prior decisions cited by this Court in *Whiteley, supra.*

What is new is Appellant's use of the line of cases in *Whiteley, supra,* for the very first time on this appeal, to support new issues unrelated to the validity of the state statutes (App. B, p. A 9) vesting quasi-judicial power in the municipal court clerks to issue arrest warrants, and impliedly therewith, determine probable cause, as *expressly passed upon* by the Supreme Court of Florida. (App. A, pp. A 1-3).

Appellee urges this Court to distinguish two unrelated questions. The first question was presented timely and properly, and expressly passed upon, that being the validity of the state statutes vesting in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine probable cause. (App. A, pp. A 1-3). The second question, unrelated to the first, seeking this Court's probable jurisdiction and silent sanction to be briefed and orally argued, is the insufficiency of the affidavit as a rubber stamp procedure not meeting the probable cause requirements of *Whiteley, supra.*

The first question involves, in the first instance, the authority or power of the city clerk to act at all.

The second question, unlike the first, assumes the authority or power is valid, but not properly exercised.

Which question did Appellant argue to the Supreme Court of Florida?

> "Appellant says the clerk or deputy clerk of the municipal court is not a judicial officer such as could *perform the duties* of determining probable cause *or act* as a neutral or detached magistrate in the exercise of a judicial discretion to determine the existence of probable cause." Shadwick v. City of Tampa, 250 So.2d 4, 5 (1971); App. A, p. A 2. (Emphasis supplied).

Appellant has not been tried or convicted in municipal court and has not lost his rights to raise these new issues upon the ultimate disposition of these appellate proceedings, which commenced immediately after his arrest. (R. 6-7; App. C, pp. A 12-13).

Even admitting, for the sake of argument, that the affidavit (R. 4; App. C, p. A 10) is insufficient because of its conclusionary terms, and therefore fails to meet the probable cause requirements of *Whiteley, supra,* a finding by this Court of probable jurisdiction on this issue would simple be a rehash of the decisions in *Whiteley* and an obvious waste of this Court's time. The question having already been passed upon by this Court, it is not substantial.

Furthermore, such a question does not involve the validity of a state statute necessary to invoke this Court's jurisdiction sought by Appellant in this appeal under 28 U.S.C. 1257 (2).

The properly raised question from the final judgment below (App. A, pp. A 1-3) that the quasi-judicial power under state statutes for a city clerk of municipal court to issue arrest warrants, and act as a neutral and detached magistrate to determine probable cause has already been favorably passed upon by prior decisions of this Court. *Giordenello* v. *U.S.*, 357 U.S. 480, 486 (1958); *Ocampo* v. *U.S.*, 234 U.S. 91, 100 (1914); *J. D. Compton* v. *State of Alabama*, 214 U.S. 1, 7 (1909); *In re Keller*, 36 F. 681 (1888), cited with approval in *Pettibone* v. *Nichols*, 203 U.S. 192, 204 (1906).

Where prior decisions of this Court leave no room for *real controversy*, the federal question is not substantial. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902).

CONCLUSION I.

In conclusion, Appellee respectfully shows the Court that this appeal does not present a substantial federal question.

WHEREFORE, Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Florida.

ARGUMENT II.

The federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

The only final judgment reviewable is that of the Supreme Court of Florida expressly passing on the validity of the state statutes here involved (App. B, p. A

9) as not being repugnant to the Fourth and Fourteenth Amendments, United States Constitution.

However, Appellant in the Jurisdictional Statement raises issues of the sufficiency of the affidavit being in conclusionary terms, the standards of probable cause required to issue warrants in accordance with the decisions in *Whiteley, supra,* and "rubber stamp" warrant procedures. (JS. pp. 1-9).

These issues were not raised, briefed or argued in the trial court, the Municipal Court of the City of Tampa (R. 6, 7, 8; App. C, pp. A 12-14); nor in the Circuit Court, Hillsborough County, Florida, on Petition for Writ of Certiorari (R. 1, 2, 3, 9; App. C, pp. A 15-18); nor on appeal to the intermediate state court, the District Court of Appeal, Second District, by assignments of error (R. 11; App. C, p. A 19), except in a passing comment on oral argument and then raised for the first time in Appellant's Petition for Rehearing (R. 62, 63, 64, 65; App. C, pp. A 20-23) to that intermediate court and not briefed or argued in the Supreme Court of Florida by Appellant (App. D, pp. A 24-55) or Appellee. (App. D, pp. A 56-76).

In the Supreme Court of Florida, ". . . Such assignments of error as are not argued in the briefs will be deemed abandoned and may not be argued orally . . ." 32 Florida Statutes Annotated, Appellate Rule 3. 7(i) at p. 160.

Decisions of intermediate state courts are not final judgments reviewable by this Court. (App. A, pp. A 4-8). *Banks* v. *California,* 395 U.S. 708 (1969).

In short, Appellant failed to press the issues to the highest court of this State and having failed to do so these federal questions sought to be reviewed were not timely or properly raised, or expressly passed on. *DeBacker* v. *Brainard*, 396 U.S. 28 (1969); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Palmieri* v. *Florida*, 393 U.S. 218 (1969); *Oxley Stave Co.* v. *Butler Co.*, 166 U.S. 648 (1897).

The Jurisdictional Statement contains unsubstantiated inferences that the clerk did not have sufficient information to support an independent judgment of probable cause. (JS. p. 5).

> "... the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere *inferences*, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Oxley Stave Co.* v. *Butler Co.*, 166 U.S. 648, 655 (1897). (Emphasis supplied.)

Appellant has relied heavily upon *Whiteley, supra,* in the Jurisdictional Statement to support a substantial federal question, but in *Whiteley* the issues of insufficiency of the warrant and probable cause had been preserved at *every* stage in the proceedings below.

> "Yet the state concedes, as on the record it must, that at *every* stage in the proceedings below petitioner argued the insufficiency of the warrant as well as the lack of probable cause at the time of the arrest." 401 U.S. ——, 91 S.Ct. at 1037. (Emphasis supplied.)

This Appellant has failed to do so at *every* stage in the proceedings below.

Furthermore, *Whiteley* did not involve the validity of a state statute and ultimately turned on a warrantless arrest and seizure in a county other than the one in which the original warrant was issued.

By reason of the foregoing jurisdictional defects, 28 U.S.C. 2103 is not applicable whereby this appeal should be summarily dismissed without considering this appeal as a petition for certiorari. *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1943).

CONCLUSION II.

In conclusion, Appellee respectfully shows the Court that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on by, the Supreme Court of Florida.

WHEREFORE, Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Florida.

ARGUMENT III.

The Court should not set the case for argument because the decision below is so obviously correct as to warrant no further review.

The decision on appeal is founded solidly upon fundamental principles of law so well established as to warrant no review.

1. Determination of probable cause for arrest need not be confined to strictly judicial officers, as such a function is only quasi-judicial. *Ocampo* v. *United States*, 234 U.S. 91, 100 (1914).

2. Acts, partially judicial in nature *(quasi-judicial)*, such as the power to issue arrest warrants, may be performed by clerks when so provided by *legislative provision (statutes)* even when their other duties are purely ministerial. 22 C.J.S. Criminal Law Sec. 318, pp. 820, 821; 15 Am. Jur. 2d, Clerk of Court Sec. 22, pp. 528, 529.

3. Arrest warrant procedure requires that inferences from facts which lead to the complaint "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958).

4. A "magistrate" is a public officer, possessing such power, legislative, executive, or judicial, as the government appointing him may ordain, although in a narrow sense he is regarded as an inferior judicial officer and the definition of the word "magistrate" as applied in the case law in the Florida and the Federal systems to determine the constitutionality of a warrant system is given a broad meaning. *J. D. Compton* v. *State of Alabama*, 214 U.S. 1, 7 (1908); *State ex rel. Miller* v. *McLeod*, 142 Fla. 254, 194 So. 628, 630 (1940).

The lower court in its decision on appeal (App. A. pp. A 1-3) did not depart from these guiding principles and held the state statutes valid.

CONCLUSION III.

In conclusion, Appellee respectfully shows the Court that this case should not be set for argument because the decision below is so obviously correct that it should not be altered or reviewed.

WHEREFORE, Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Florida.

Respectfully submitted,

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